IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

KATHRYN SCHULTZ, MARLYS E. REZAIAN, KATHERINE A. CUMMINS, and CONNIE L. NELSON,	)	
Plaintiffs,	)	4:08CV3086
v.	)	
WINDSTREAM COMMUNICATIONS, Inc.,	)	MEMORANDUM AND ORDER
Defendant.	)	

Pending before me are the cross-motions for summary judgment filed by the defendant Windstream Communications, Inc, ("Windstream"), (filing no. 53), and the plaintiffs, (filing No. 56). For the reasons discussed below, the defendant's motion for summary judgment will be granted, and the plaintiffs' motion will be denied.

STANDARD OF REVIEW

A motion for summary judgment is "properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986). In response to the moving party's evidence, the opponent's burden is to "come forward with specific facts showing that there is a genuine issue for trial." Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

> Once the moving party has met its burden of showing the absence of a genuine issue of material fact and an entitlement to judgment as a matter of law[,] . . . the non-moving party may not rest on the allegations of his pleadings, but must set forth specific facts, by affidavit or other evidence, showing that a genuine issue of material fact exists.

Krein v. DBA Corp., 327 F.3d 723, 726 (8th Cir. 2003)(internal citations omitted)).

STATEMENT OF UNDISPUTED FACTS

The parties have presented the case primarily on stipulated facts. The relevant undisputed facts are as follows:

On December 6, 2006, Windstream announced that it was realigning certain customer service, engineering and information technology functions throughout Windstream. Filing No. 52, at CM/ECF p. 3, ¶¶ 12-14. As a result of this realignment, fifteen employees from the Assignment Organization in Lincoln, Nebraska were notified on December 6, 2006 that they would be laid off on April 13, 2007. Filing No. 52, at CM/ECF p. 3, ¶¶ 12-14. The plaintiffs were among the employees laid off on April 13, 2007.[1]

As to plaintiffs Katherine Cummings ("Cummings"), Kathryn D. Schultz ("Schultz"), and Marlys E. Rezaian ("Rezaian"), as of April 13, 2007:

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[1]The layoff itself is not at issue in this case. The plaintiffs do not contend their selection for layoff was unlawful, and stipulate they were selected for layoff based on a neutral, non-discriminatory, nonretaliatory basis. Filing No. 52, at CM/ECF p. 3, ¶¶ 15-16.

- Cummins had worked for Windstream for 29 years and was 52;
- Rezaian had worked for Windstream for 28 years and was 53; and
- Shultz had worked for Windstream for 28 years and was 50.

See filing no. 52, at CM/ECF p. 1, ¶ 1.

Plaintiffs Cummins, Rezaian, and Schultz were therefore entitled to retirement benefits under the "Early Retirement–50/25" provision of the Windstream Pension Plan (the "Plan") as it existed on December 6, 2006. Early Retirement–50/25 pension benefits were available to employees who were laid off and, at the time of layoff, were at least 50 years old with at least 25 years of service. The Early Retirement–50/25 pension benefit was based on earned pension credits, but the benefit was reduced by .5% for every month the employee was under age 55 at the time of the layoff. See filing no. 52, at CM/ECF p. 2, ¶ 11(c).

In addition to the Plan's "Early Retirement-50/25" benefit, the Plan also included an "Early Retirement-30" benefit. Unlike the Early Retirement-50/25 provision, under the Plan's Early Retirement-30 provision, employees who were under the normal retirement age of 65, but had 30 years of service with the company, could retire and receive a full, unreduced pension based on their earned pension credits. See filing no. 52, at CM/ECF p. 2, ¶ 11(b).

Windstream recognized that some of the employees scheduled for layoff on April 13, 2007 were nearly eligible, but would not be eligible for any early or normal retirement pension benefits on their scheduled release date unless the Plan was amended.

Filing No. 55-3, at CM/ECF p. 8; filing no. 57-4, at CM/ECF p. 11. These employees included plaintiff Connie L. Nelson ("Nelson"), and Joni L Bates ("Bates"), Nanette M. Boardman, ("Boardman"), Debra J. Grant ("Grant"), Jacqueline M. Schmucker, ("Schmucker"), Mary M. Gilliland, ("Gilliland"), Windie L. Wolfgang, ("Wolfgang"), and Robin L. Spath ("Spath"). Filing No. 52, at CM/ECF p. 4, ¶ 28; filing no. 57-4, at CM/ECF p. 11. Bates, Boardman, Grant, Schmucker, Gilliland, Wolfgang, and Spath are referred to as the "younger employees" in the plaintiffs' amended complaint, (filing no. 25, at CM/ECF pp. 4-5, ¶¶ 11, 18), and will likewise be collectively referred to herein as the "younger employees." As of April 13, 2007:

- Nelson had worked for Windstream for 29 years and was 49.
- Bates had worked for Windstream for 29 years and was 47;
- Boardman had worked for Windstream for 29 years and was 48;
- Grant had worked for Windstream for 29 years and was 47;
- Schmucker had worked for Windstream for 28 years and was 46;
- Gilliland had worked for Windstream for 28 years and was 48;
- Wolfgang had worked for Windstream for 29 years and was 46; and
- Spath had worked for Windstream for 28 years and was 47.

See filing no. 52, at CM/ECF pp. 1, 4, ¶¶ 1, 28. Like plaintiffs Cummins, Rezaian, and Schultz, plaintiff Nelson and the younger employees had each worked for Windstream for at least 28 years,

but none of them could attain the age of 50, or have 30 years of service for Windstream, by their scheduled April 13, 2007 employment termination date.

Windstream amended the Plan, effective January 12, 2007. The amendment was intended to allow employees whose employment was being terminated due to a reduction-in-force, and who were not eligible but would have qualified for benefits had they been allowed to work until December 31, 2008, to received pension benefits immediately upon their termination. Filing No. 55-2, at CM/ECF p. 4, ¶ 8. The "Proposal to Accelerate Pension Eligibility For Specified Plan Participants Nearing Retirement," dated December 20, 2006, (filing no. 55-3, at CM/ECF pp. 8-9), was drafted by Robert R. Boyd, ("Boyd"), Vice-President of Benefits for Windstream and a member of Windstream's Benefits Committee. Filing No. 55-2, at CM/ECF p. 1, ¶¶ 2-3. Boyd submitted the proposed plan amendment (Amendment No. 2, filing no. 55-3, at CM/ECF pp. 2-6) to Windstream's Benefits Committee. Filing No. 55-2, at CM/ECF p. 2 3, ¶ 7.

Pursuant to the authority granted by Windstream's Board of Directors, the Windstream Benefits Committee approved and adopted Amendment No. 2, with an effective date of January 12, 2007. Filing No. 55-2, at CM/ECF p. 2, ¶ 8. The resolution was signed by the members of the Windstream Benefits Committee in February of 2007.[2] The resolution authorized and directed Boyd to finalize and execute Amendment No. 2 of the Windstream Pension Plan. Filing No. 55-3, at CM/ECF p. 12. The amendment was signed by Boyd and the Plan was amended on December 20, 2007,

[2]Three of the members signed the resolution on February 19, 2007; one signed on February 23, 2007. Filing No. 55-3, at CM/ECF p. 12.

(filing no. 52, at CM/ECF p. 4, ¶ 24; filing no. 55-3, at CM/ECF p. 6), but the amendment's effective date was January 12, 2007. Filing No. 55-3, at CM/ECF p. 2. The plaintiffs began receiving pension payments following their layoff on May 1, 2007. Filing No. 58 (plaintiff's summary judgment brief), at CM/ECF p. 6, ¶ 20; filing no. 61 (defendant's summary judgment opposition brief), at CM/ECF p. 61, ¶ 20.

Amendment No. 2 listed individuals who were laid off on April 13, 2007, but did not list and did not address or modify the retirement benefits owed to plaintiffs Cummins, Rezaian, and Schultz under the Plan. Plaintiffs Cummins, Rezaian, and Schultz received the Early Retirement-50/25 benefit pursuant to the pre-amendment version of the Plan. Had Cummins, Rezaian, and Schultz been presumed to work until December 31, 2008, they could have accumulated 30 years of service and would have been eligible for the Early Retirement-30 unreduced pension benefit. Filing No. 52, at CM/ECF pp. 4-5, ¶¶ 24, 36.

Plaintiff Nelson, and the younger employees were listed in Amendment No. 2 as receiving benefits under the amendment. As drafted by Boyd, and approved by the Windstream Benefits Committee, the employees specified in Amendment No. 2 received the early retirement benefit for which they would first become eligible if they had continued to work until December 31, 2008. Filing No. 52, at CM/ECF pp. 4-5, ¶ 30; filing no. 55-2, at CM/ECF p. 1, ¶ 6.

Amendment No. 2 stated that plaintiff Nelson would receive the benefits outlined in the Plan's Appendix MM, section 4.02(a)(2). Filing No. 52-9, at CM/ECF p. 41. Pursuant to Appendix MM, section 4.02(a)(2), Nelson was allowed to receive

the Early Retirement-50/25 benefit. Filing No. 52-8, at CM/ECF p. 36. Nelson turned 50 after April 13, 2007, but approximately three weeks before she would have accumulated 30 years of service for Windstream. Filing No. 52, at CM/ECF p. 1, ¶ 1. Therefore, the early retirement benefit for which Nelson would have first become eligible had she not been laid off on April 13, 2007, and been allowed to continue working until December 31, 2008, was the Early Retirement-50/25 pension benefit. Had the plan amendment allowed her to recover benefits assuming she worked until December 31, 2008, and not limited her to the early retirement benefit for which she first became eligible following her termination, Nelson would have received the unreduced pension benefit afforded to those with 30 years of service.

Pursuant to Amendment no. 2, Bates, Boardman, Grant, Schmucker, Gilliland, Wolfgang, and Spath were deemed eligible to receive Early Retirement-30 benefits as outlined in the Plan's Appendix MM, section 4.02(a)(3). Filing No. 52-8, at CM/ECF p. 36; filing no. 52-9, at CM/ECF pp. 40-43. Had each of these "younger employees" worked until December 31, 2008, they would have attained 30 years of service with the company before they turned 50 years of age. Therefore, the early retirement benefit for which they would have first become eligible following their termination was the full, unreduced Early Retirement-30 benefit.

LEGAL ANALYSIS

The plaintiffs' amended complaint, (filing no. 25), seeks injunctive and monetary relief, reinstatement of benefits, punitive damages, and attorney fees for defendant's alleged violations of the Employee Retirement Income Security Act

(ERISA), 29 U.S.C. § 1001, et seq., the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, et seq., and the Nebraska Age Discrimination in Employment Act, Neb. Rev. Stat. § 48-1001 et. seq. The plaintiffs allege:

> Windstream violated ERISA by:
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> - Arbitrarily and capriciously reducing plaintiffs' retirement benefits, while allowing full benefits to the younger employees, in violation of the fiduciary duties owed to plan participants under 29 U.S.C. § 1104;
> - Violating 29 U.S.C. § 1102(b)(4) by failing to specify the basis on which payments are made from the Plan.
> - Failing to follow its procedure for amending the Plan, in violation of 29 U.S. C. § 1102(b)(3); and
> - Adopting and implementing a Plan amendment that reduced the retirement benefits payable to plaintiffs because of their age in violation of 29 U.S.C. § 1052(a)(2) and 29 U.S.C. § 1054(b)(1)(H)(i).

The plaintiffs further claim the defendant violated the federal and Nebraska Age Discrimination in Employment Acts[3] by paying the similarly situated younger employees more retirement benefits than those paid to the plaintiffs.

[3]The plaintiffs' brief clarifies that plaintiffs are not raising a disparate impact claim. Filing No. 60, at CM/ECF pp. 18-19. Disparate impact will therefore not be discussed in this memorandum and order.

A. ERISA Claims.

1. Breach of Fiduciary Duty.

"[T]he ERISA scheme envisions that employers will act in a dual capacity as both fiduciary to the plan and as employer." Hickman v. Tosco Corp., 840 F.2d 564, 566 (8th Cir. 1988). ERISA "requires that an employer-fiduciary 'wear the fiduciary hat when making fiduciary decisions.'" Kalda v. Sioux Valley Physician Partners, Inc., 481 F.3d 639, 645 (8th Cir. 2007). An employer engaged in the role of administering the terms of a plan governed by ERISA owes a fiduciary duty to the plan participants. FirsTier Bank, N.A. v. Zeller, 16 F.3d 907, 910 (8th Cir. 1994).

However, "[a]n employer's decision to amend . . . an employee benefit plan is unconstrained by the fiduciary duties that ERISA imposes on plan administration." Anderson v. Resolution Trust Corp., 66 F.3d 956, 960 (8th Cir. 1995)(quoting Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1162 (3d Cir. 1990). ERISA does not prohibit an employer from acting in accordance with its interests as employer when not administering the plan or investing its assets. Employers are generally free under ERISA, for any reason or at any time, to adopt, modify, or terminate plans that provide pension benefits without being considered as functioning in a fiduciary capacity under ERISA. Lockheed Corp. v. Spink, 517 U.S. 882, 895 (1996); Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 78 (1995). An employer's decision to amend a plan to modify or eliminate nonvested benefits is considered a "settlor" function" and is not governed by ERISA's fiduciary standards. Lockheed Corp., 517 U.S. at 890.

The plaintiffs seek monetary and injunctive relief for harm allegedly caused by Windstream's violation of fiduciary duties owed to the plaintiffs. However, the plaintiffs do not allege they were denied full, unreduced retirement benefits because Windstream, as plan administrator, failed to carry out the terms of the Windstream Plan. Plaintiffs Cummins, Rezaian, and Schultz were over 50 years of age with more than 25 years of experience when their employment was terminated, they were thereby entitled to "Early Retirement-50/25" retirement benefits under the terms of the pre-amendment Plan, and they have received those benefits. Under the terms of Amendment No. 2, plaintiff Nelson was entitled to "Early Retirement-50/25" retirement benefits, and she has received those benefits. There are no facts to support a claim that Windstream, in its capacity as plan administrator, violated fiduciary duties owed to the plaintiffs by failing to pay pension benefits to the plaintiffs in accordance with the terms of the Plan.[4]

While plaintiffs Cummins, Rezaian, and Schultz were entitled to pension benefits under the pre-amendment Plan, plaintiff

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[4]Although the plaintiffs cite Metropolitan Life Ins. Co. v. Glenn, 128 S.Ct. 2343, 2349 (2008) as binding authority in this case, Metropolitan Life is not applicable to plaintiffs' alleged claims. Metropolitan Life held that when a plan administrator both evaluates claims for benefits and pays benefit claims, a "conflict of interest" arises, and the courts must consider this conflict in determining if the plan administrator violated its fiduciary duty in denying a plan participant's claim.

The plaintiffs are not, however, claiming Windstream, as plan administrator, violated the terms of the Plan as written. They are claiming Plan Amendment No. 2 should have been more inclusive and written differently. I therefore need not decide whether Windstream is acting as both the plan administrator and payor of plan benefits and therefore has a conflict of interest in carrying out these roles, and I need not determine the standard of review to apply in determining whether Windstream properly administered and paid benefits owed under the Plan.

Nelson would have received no pension benefit had the Plan not been amended. The plaintiffs argue that once Windstream decided to amend the Plan to afford benefits to long-time employees who would not otherwise receive a pension benefit, the amendment should have been written broad enough to deem all the laid off employees who would have attained 30 years of service by December 31, 2008 eligible for full, unreduced "Early Retirement-30" benefits. In other words, the plaintiffs do not claim the Plan should not have been amended. They claim the amendment did not go far enough. The plaintiffs argue the amendment should have increased the benefits owed to plaintiffs Cummins, Rezaian, and Schultz, who were already entitled to Early Retirement-50/25 pension benefits under the pre-amendment Plan, and should have created an Early Retirement-30, rather than and Early Retirement-50/25 benefit for plaintiff Nelson.

Windstream was acting in a "settlor function," not as a plan administrator, when it created and adopted Amendment No. 2. Windstream's failure to expand, by plan amendment, the early retirement benefits owed to plaintiffs Cummins, Rezaian, and Schultz, or to create more extensive benefits for plaintiff Nelson did not violate any fiduciary duty owed under ERISA. Hickman v. Tosco Corp., 840 F.2d 564 (8th Cir. 1988)(holding the defendant employer, who was both the plan sponsor and administrator, owed no fiduciary duty to the plaintiffs, who were 54-year-old refinery employees terminated when the refinery was sold, and who were requesting a plan modification allowing them to receive the full, unreduced retirement benefits owed to 55-year-old employees with 30 years of service); Anderson v. Consolidated Rail Corp., 297 F.3d 242, 252 (3d Cir. 2002)(holding the employer railroad was acting as a settlor, and did not breach its fiduciary duty when it amended its plan to extend Voluntary

Separation Program benefits to certain ex-employees terminated in 1996, without providing the same benefits to employees terminated in 1995).

2. Failure to Properly Amend the Plan; Failure to Specify How Benefits are to be Paid.

The plaintiffs allege Windstream did not properly amend the Plan before benefit payments under the amendment began because, under the terms of the Plan, "an amendment adopted without "action of or pursuant to" the authority of the [Windstream] Board of Directors is a violation of ERISA." Filing No. 16, at CM/ECF p. 16. The plaintiffs then argue that since Amendment No. 2 was not properly adopted until December 20, 2007, as of May 1, 2007, when pension benefit payments to the plaintiffs commenced following their termination, the Plan lacked terms "specify[ing] the basis on which payments [were] made to and from the plan." 29 U.S.C. § 1102(b)(4).

The court questions whether the plaintiffs have any standing to raise these issues. To have standing, the plaintiffs themselves must have suffered an actual harm, or be facing imminent harm, by the loss of a legally protected interest; there must be a causal connection between the injury and the conduct complained of; and it must be likely that the plaintiffs' injury will be "redressed by a favorable decision." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

Amendment No. 2 did not modify the pension benefits owed to plaintiffs Cummins, Rezaian, and Schultz. These plaintiffs are being paid in accordance with the terms specifying their right to recover Early Retirement-50/25 benefits as set forth in the pre-amendment Plan. Plaintiffs Cummins, Rezaian, and Schultz cannot

show their alleged injuries were caused by the allegedly improper procedure for adopting Amendment No. 2, or the alleged lack of specificity in that amendment. Moreover, the pension benefits owed to plaintiffs Cummins, Rezaian, and Schultz will remain unchanged if the plaintiff prevails; that is, even if the court finds Amendment No. 2 was not properly adopted and that it failed to specify the amounts to be paid to those named in the amendment, plaintiffs Cummins, Rezaian, and Schultz will still receive Early Retirement-50/25 benefits.

As to plaintiff Nelson, absent the amendment, she would have received no pension benefits upon termination. She has made no showing that the amendment would have been substantively different had it been signed by the Board of Directors itself before the payment of pension benefits commenced, or that she was entitled to, but deprived of, any legal right to claim that a different, more lucrative pension benefit should have been created for her and adopted by the Board. ERISA does not create any substantive entitlement to employer-provided pension benefits. Lockheed Corp., 517 U.S. at 895.

Although the plaintiffs argue "an amendment reduced to writing on December 20, 2007 cannot serve as notice to participants who were affected by the amendment more than six months earlier on April 13th 2007," (filing no. 58, at CM/ECF p. 17), plaintiffs Cummins, Rezaian, and Schultz were not affected by the amendment, and plaintiff Nelson was granted, not deprived of benefits under the amendment. The plaintiffs cannot show they were harmed by Windstream's alleged failure to provide proper notice that the Plan was being amended, properly adopt Amendment No. 2, or specify how benefits would be paid under the amendment. See e.g., Godwin v. Sun Life Assur. Co. of Canada, 980 F.2d 323,

328 (5th Cir. 1992)(holding an amendment to an ERISA benefit plan is valid despite a beneficiary's lack of personal notice, unless the beneficiary can show active concealment of the amendment, or some significant reliance upon, or possible prejudice flowing from the lack of notice.)

Even assuming the plaintiffs have standing, the plaintiffs cannot prevail on their claims that Windstream failed to properly amend the Plan and failed to specify the benefits owed. Plan fiduciaries must administer an ERISA plan "in accordance with the documents and instruments governing the plan," (29 U.S.C. § 1104(a)(1)(D)), and make payments to a "beneficiary designated by a participant, or by the terms of a plan." 29 U.S.C. § 1002(8); Egelhoff v. Egelhoff ex rel. Breiner, 532 U.S. 141, 147 (2001). Therefore, "[a]bsent a written arrangement specifying how benefits are to be paid, no ERISA welfare plan exists." Administrative Committee of Wal-Mart Stores, Inc. Associates' Health and Welfare Plan v. Gamboa, 479 F.3d 538, 544 (8th Cir. 2007)(citing 29 U.S.C. § 1102(b)(4)). However, "no single act in itself necessarily constitutes the establishment of the plan," or an amendment to the plan. Harris v. Arkansas Book Co., 794 F.2d 358, 360 (8th Cir. 1986)(quoting Donovan v. Dillingham, 688 F.2d 1367, 1373 (11th Cir. 1982)). In determining if a plan has been validly created or amended, the court must determine whether "from the surrounding circumstances a reasonable person could ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits." Id.

The Windstream Benefits Committee, acting under the authority granted by the Windstream Board of Directors, signed a resolution in February 2007 which authorized Boyd, as Vice President of Benefits, to finalize and execute Amendment No. 2 and carry out

the transactions contemplated by that amendment. Amendment No. 2 specifically described, by reference to Appendix MM of the Plan, the benefits to be paid to plaintiff Nelson. Under the undisputed evidence, plaintiff Nelson began receiving pension benefits in accordance with Amendment No. 2 on May 1, 2007. Although Amendment No. 2 was not formally executed by Boyd until December 20, 2007, the evidence is undisputed that the amendment was adopted by resolution in February 2007 and described, either independently or by reference to the Plan itself, the benefits owed under the amendment, to whom they were owed, that the Plan itself was the funding source, and the procedures to implement benefit payments. The plaintiffs have failed to show the Plan was not properly amended or that as of the date when benefit payments commenced under the amendment, the amendment lacked sufficient specificity to determine how benefits were to be paid.

3. Denying Unreduced Pension Benefits Because of Age in Violation of ERISA, the ADEA, and Nebraska's Employment Discrimination Law.

The plaintiffs claim Windstream violated 29 U.S.C. § 1054(b)(1)(H)(i) and 29 U.S.C. § 1052(a)(2) in that the plaintiffs' pension benefit accrual ceased and the plaintiffs were excluded from participation in the Plan because they attained the age of 50. They also claim Windstream's failure give the plaintiffs "fair credit for their years of service being in excess of some of the [employees listed in Amendment No. 2] and not giving them pension credit to their 30 years of service is violative of Age Discrimination Law both for the state of Nebraska and Federally." Filing No. 60, at CM/ECF p. 15. The plaintiffs argue they "were not allowed to accrue the service that the younger employees were." Filing No. 60, at CM/ECF p. 15.

The plaintiffs' age discrimination claims are based on the following evidence:

- The dates of birth and service dates for plaintiffs Cummins, Rezaian, and Schultz.
- The dates of birth and service dates for those employees identified in Amendment No. 2, including plaintiff Nelson and the younger employees;
- The terms of the Plan and Amendment No. 2; and
- Plaintiffs' receipt of Early Retirement-50/25 benefits, rather than the Early Retirement-30 benefits received by the younger employees identified in Amendment No. 2.

The plaintiffs have presented no additional evidence that Amendment No. 2 was "actually motivated" by age.

The court must therefore consider the terms of the Plan, as amended, and determine whether the plaintiffs were treated differently because of age rather than pension status. Kentucky Retirement Systems v. E.E.O.C., 128 S.Ct. 2361, 2370 (2008). Kentucky Retirement illustrates how this determination should be made. In Kentucky Retirement, the EEOC alleged that Kentucky's state disability retirement plan discriminated against older workers by excluding employees who were above "normal retirement age" from receiving disability retirement benefits and by using "normal retirement age" to compute disability benefits in a way that disfavored older workers who had not reached normal retirement age, as compared to younger workers who were identical in all other relevant respects. Specifically, under the Kentucky plan, an employee was entitled to early retirement once he or she had accumulated 20 years of service for the state, or was 55 with five years of service. If a worker under 55 became disabled before he or she had 20 years of state employment, Kentucky's plan

imputed enough years of service to the employee's actual years of service to allow the disabled employee to either have 20 years of service, or be 55 with 5 years of service, whichever came first. However, if the employee was already eligible for normal retirement when the disability arose, no years were imputed in calculating the disabled employee's retirement benefit.

The Kentucky Retirement Court explained that under Kentucky's plan, if an employee with 17 years of service became disabled at the age of 48, the plan added three years of service and calculated the employee's retirement benefits based on 20 years of service. However, if the employee had already attained the age of 55 with at least five years of service, no additional years were imputed. The EEOC claimed Kentucky's plan terms were facially discriminatory based on age. The Kentucky Retirement Court disagreed.

The Court held:

> Where an employer adopts a pension plan that includes age as a factor, and that employer then treats employees differently based on pension status, a plaintiff, to state a disparate treatment claim under the ADEA, must adduce sufficient evidence to show that the differential treatment was "actually motivated" by age, not pension status.

Kentucky Retirement, 128 S.Ct. at 2370. Kentucky Retirement considered six separate factors in determining that the differential treatment evidenced in Kentucky's plan was based on pension status, not age. The Court explained these factors provide "an indication of what [plaintiffs] might show in other cases to meet [their] burden of proving that differential treatment based on pension status is in fact discrimination 'because of' age." Kentucky Retirement, 128 S.Ct. at 2370. At

least four of the factors discussed in Kentucky Retirement weigh against the plaintiffs in this case.

"[A]s a matter of pure logic, age and pension status remain 'analytically distinct' concepts." Kentucky Retirement, 128 S.Ct. at 2367 (2008)(quoting Hazen Paper Co. v. Biggins, 507 U.S. 604, 611 (1993)). As explained in Hazen Paper, "[o]n average, an older employee has had more years in the work force than a younger employee, and thus may well have accumulated more years of service with a particular employer." Hazen Paper, 507 U.S. at 611. However, if a younger employee has worked for a particular employer his or her entire career, while an older worker was more recently hired, the employer's decision to afford plan benefits based on years of service is not "age based" even though the younger employee receives a greater benefit than the older one. Id.

The plaintiffs and the younger employees had all worked for Windstream for at least 28 years.[5] Simple math confirms the younger employees began their jobs with Windstream at an earlier age. Therefore, under the terms of the pre-amendment Plan, unless the younger employees quit or their employment was terminated before they attained 30 years of service, these were going to be eligible for unreduced Early Retirement-30 benefits at a younger age than any of the plaintiffs. Amendment No. 2 may have highlighted the difference in retirement accrual between those who began Windstream employment before the age of 20 and those who began thereafter, but the effect was a mathematical certainty from

[5]Of the plaintiffs, Cummins had worked the longest for Windstream before her job was eliminated, but non-plaintiffs Bates and Boardman, although younger than Cummins, had actually worked for the company longer.

the outset of the Plan. The employees identified in Amendment No. 2 (other than plaintiff Nelson) were under 20 when they began their Windstream employment. Even in the absence of Amendment No. 2, and based only years of service, not age, they were all on course to earn a full, unreduced Early Retirement-30 retirement benefit before they were 50 years old; further, they would accumulate more earned service credits toward retirement before reaching the Plan's normal retirement age of 65 than the plaintiffs and any other employees who started working for Windstream after age 20..

Unlike the plaintiffs, the early retirement benefit for which they were first became eligible under the terms of the Plan following their April 13, 2007 release was the Early Retirement-30 benefit. This provision, which affords pension benefits based on longevity with the company, without any reference to age, is the source of any disparity in retirement eligibility between the younger employees and the plaintiffs. This disparity was not created by Amendment No. 2.

The distinction between Early Retirement-30 and Early Retirement-50/25 is carefully and fully set forth in the Plan, not Amendment No. 2. Amendment No. 2 merely identified those employees with more than 28 years of experience who would not, in the absence of a Plan amendment, receive any retirement benefits solely because they were too young. Amendment No. 2 specifically stated, by employee, which Early Retirement benefit the employee would receive, and that benefit was based on which Early Retirement benefit would the employee would have earned first had she been allowed to continue working to December 31, 2008. All the employees with 28 years of experience and released on April 13, 2007, including the plaintiffs, were participants in a Plan

that contained Early Retirement-30 and Early Retirement-50/25 provisions. Therefore, as in Kentucky Retirement, this court is not considering "an individual employment decision, but a set of complex system-wide rules [which] involve, not wages, but pensions--a benefit that the ADEA treats somewhat more flexibly and leniently in respect to age." Kentucky Retirement, 128 S.Ct. at 2367-68.

It is clear from the facts of record that Windstream imputed years of service to plaintiff Nelson and the younger employees to treat them as though their employment had been terminated after, rather than before, their first opportunity to claim Early Retirement benefits. As in Kentucky Retirement, age is a factor in the benefit received only because the Plan permissibly includes age as a consideration when defining early retirement benefits. The disparity in the retirement benefit afforded the younger employees compared to the plaintiffs is a function of pension eligibility under the Plan terms. Under such circumstances, "[t]here is a clear, non-age-related rationale for the disparity here at issue." Kentucky Retirement, 128 S.Ct. at 2368.

The eligibility provisions of the Plan, and the Early Retirement benefits created and assigned in Amendment No. 2, are not based on stereotypical assumptions that older workers have less work capacity.[6] See e.g., Solon v. Gary Community School Corp., 180 F.3d 844, 852-855 (7th Cir. 1999)(holding that an early

[6]In fact, a comparison of the benefits received by the plaintiffs under the Early Retirement-50/25 provision indicates the Plan actually includes a financial incentive for employees to work beyond 50 years of age. Of the plaintiffs, Rezaian is the oldest. Because she was the oldest, her pension benefit will be reduced by the lowest percentage under the Early Retirement-50/25 pension provision even though, of all the plaintiffs, she was employed by Windstream for the least amount of time.

retirement incentive plan was discriminatory on its face; the plan allowed employees retiring at age 58 to receive four years of incentive payments, while only allowing two years of incentive payments to those retiring at age 60, and none to those retiring at or after age 62, evidencing the defendant's desire to eliminate workers based on advancing age). Rather, Windstream assumed all the employees nearing early retirement eligibility, but released on April 13, 2007 before they were eligible, would have continued working until they were eligible for early retirement. This assumption was applied equally to all such employees, irrespective of age. Kentucky Retirement, 128 S.Ct. at 2369.

The plaintiffs' early retirement benefits were not reduced or discontinued "on account of the attainment of a specified age" in violation of ERISA. The plaintiffs benefits were determined by the eligibility requirements of the Plan, and their continued accrual of years of service ceased because they were laid off. Although the Plan's retirement provisions include age as one factor in determining eligibility for early retirement, a plan may provide for retirement ages without violating the ADEA. See 29 U.S.C. § 623(i)(8)("A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement age . . . ").

Proving age discrimination under the ADEA, (29 U.S.C. § 623(i)(1)(B)), the Nebraska Unjust Discrimination in Employment because of Age Act,[7] and ERISA (29 U.S.C. § 1052(a)(2) & (29 U.S.C. § 1054(b)(1)(H)(i)), requires more than showing that the

[7]Nebraska's Age Discrimination in Employment Act, (Neb. Rev. Stat. § 48-1001 et. seq.), is interpreted consistent with the federal ADEA. Humphrey v. Nebraska Public Power Dist., 243 Neb. 872, 878, 503 N.W.2d 211, 217 (Neb. 1993). The state act has therefore not been independently interpreted and discussed.

early retirement benefits received by the younger employees exceeded those received by the plaintiffs. The plaintiffs must show the disparity is "because of" age. The plaintiffs have failed to show that the employees laid off on April 13, 2007 were afforded differing early retirement benefits under the Plan because of age, or that Windstream's act of adopting Amendment No. 2, or failing to adopt an amendment that granted more generous benefits to all employees laid off on April 13, 2007 who had more than 28 years of service, including the plaintiffs, was "actually motivated" by age.

IT THEREFORE HEREBY IS ORDERED:

1. The plaintiff's motion for summary judgment, (filing No. 56), is denied.

2. The defendant's motion for summary judgment, (filing no. 53), is granted.

3. This case is dismissed in its entirety.

4. Judgment shall be entered by separate document.

DATED this 16th day of April, 2009.

BY THE COURT:

s/ David L. Piester
David L. Piester
United States Magistrate Judge